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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 891

CORVALLIS SAND & GRAVEL CO., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701; P. R. WAGES, CLYDE JOHNSON, and CARL REAMS, Individually and as Representatives of a Class to Which They Belong; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS and LEONARD RUNKLE, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Health and Welfare Fund; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS, LEONARD RUNKLE and WM. D. ROBERTSON, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Pension Fund,
Respondents.

EUGENE SAND & GRAVEL, INC., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701 et al,
Respondents.

WILDISH SAND & GRAVEL CO., an Oregon corporation,
Petitioner,
vs.
HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701 et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701; P. R. WAGES, CLYDE JOHNSON, and CARL REAMS, Individually and as Representatives of a Class to Which They Belong; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS and LEONARD RUNKLE, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Health and Welfare Fund; P. R. WAGES, CLYDE JOHNSON, CARL REAMS, M. A. ERLAND, W. RAY ROGERS, LEONARD RUNKLE and WM. D. ROBERTSON, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Pension Fund;
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WILDISH SAND & GRAVEL CO., an Oregon corporation,
Petitioner,

vs.

HOISTING AND PORTABLE ENGINEERS LOCAL UNION NO. 701 et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon entered in the above case on October 12, 1966.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at 83.Or Adv Sh 235, 419 P2d 38. It is printed in Appendix B, infra 17.

JURISDICTION

The judgments of the Supreme Court of Oregon were entered October 12, 1966, infra 29. Petitioners did not petition for rehearing. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

1. Whether state courts are pre-empted by the Labor Management Relations Act of 1947, as amended, of jurisdiction over suits against trustees of health and welfare and pension trusts to recover contributions paid under illegally coerced collective bargaining agreements which have been set aside by the National Labor Relations Board.

2. Whether the decision of the National Labor Relations Board setting aside contracts under which employers contributed to health and welfare and pension trusts affected the contract rights of the trustees to hold and administer the contributed funds.

STATUTES INVOLVED

The statutes involved are the Labor Management Relations Act of 1947 (61 Stat 136, 29 USC § 141 et

seq), as amended, and the Welfare and Pension Plans Disclosure Act (72 Stat 997, 29 USC § 301 et seq), as amended. The provisions particularly involved are printed in the Appendix A, infra 13.[1]

STATEMENT OF THE CASE

These cases, which were consolidated in the court below, were brought by petitioners against the trustees of health and welfare and pension trusts to recover contributions paid under collective bargaining agreements which the National Labor Relations Board (the Board) set aside on the ground that they had been procured through illegal duress, restraint and coercion by the union in violation of federal law. Petitioners alleged that the Board in its decision

> "* * * thus duly made, ordered that said separate contract or purported contract was illegal, voided, set aside and of no effect." (R 3, 21, 38)[2]

The complaints alleged that the money had been paid prior to the Board's decision, that it "would not have been paid" except for the contracts, that neither

1. Those provisions are 29 USC § 158(b)(1), (3); 29 USC § 160(a), (b) and (c); 29 USC § 186(a), (b) (1) and (c); and 29 USC § 309 (b).

2. The Board's decision is reported at (1963) 141 NLRB 469. Petitioners also sought judgment against the union for these sums and for sums paid to union members under the illegal agreements. The court below held that the claims against the union were also pre-empted by LMRA. This petition does not challenge that determination, but only the decision that actions would not lie against the trustees.

the trusts nor the trustees were or could be parties to the Board proceedings, and that there were no Board procedures available to petitioners to recover the money (R 3; 21, 38).

The respondent trustees demurred on the grounds that the court lacked jurisdiction over the subject matter of the suits and that the complaints did not state a cause of suit. The basis of the demurrers was the contention that petitioners' claims were pre-empted by LMRA (R 10, 28, 45).

The trial court sustained the demurrers, and the Supreme Court of Oregon affirmed. As to the trustees, it stated:

> "Plaintiff makes the contention that the Board had no jurisdiction over the trustees and that therefore there could be no pre-emption of plaintiff's claims against the trustees. Presuming the Board had no jurisdiction over the trustees, there is still no basis for relief against the trustees in court. Restitution from the trustees would be as much regulation of federal labor policy concerning unfair labor practices as would restitution by the union. The trustees are third-party beneficiaries of the contract between plaintiffs and the union. If, in the opinion of the Board, federal labor policy does not require the union, which was a party to the contract, to make restitution, there is no basis for asserting that the trustees should be required to do so by a state court where no state law or policy is offended. As has been previously quoted in this opinion from Garmon: '* * * since remedies form an ingredient of any integrated scheme of regulation, to allow the State

to grant *a remedy* here *which has been withheld from the National Labor Relations Board* only accentuates the danger of conflict.' (Emphasis added.)" (R 61; infra 25)

REASONS FOR GRANTING THE WRIT

The court below decided important questions of federal law which have not been, but should be, settled by this Court.

I.

The court below erroneously held that the suits, which were against persons not parties to the agreements or the Board proceedings, invaded the jurisdiction of the Board to remedy unfair labor practices and were pre-empted by the Act.

a. The rapid growth of health and welfare and pension trust funds and their importance in American industry have been recognized by this Court. *Lewis v. Benedict Coal Corp.*, (1960) 361 US 459 at 469-470. Except as such trusts are regulated by 29 USC § 186 of LMRA and the Pension Fund Reporting and Disclosure Act (29 USC § 301) this growth has taken place within the framework of collective bargaining.[3] There are literally thousands of such funds, administered by trustees

3. Health and welfare and pension trusts are a subject of compulsory bargaining under § 8(a)(5) of LMRA. *Inland Steel Co. v. National Labor Relations Board*, (CA 7 1948) 170 F2d 247 at 251, cert den (1949) 336 US 960; *W. W. Cross & Co. v. National Labor Relations Board*, (CA 1 1949) 174 F2d 875 at 877-878.

who are appointed in equal numbers by employers and labor organizations and are third party beneficiaries of the collective bargaining agreements. The rights of the trustees are derivative and rise no higher than those of the immediate parties to the agreement. *Lewis v. Lowry*, (CA 4 1961) 295 F2d 197 at 199, cert den (1962) 368 US 977, reh den (1962) 369 US 813. The relationship between such trusts and the jurisdiction of the Board over unfair labor practices is a matter of great importance which has never been considered by this Court.

b. These actions, in effect, sought to wind up the affairs of the trusts as to these employers and recover the funds previously paid to them, on the ground that the agreements under which the contributions were made had been set aside by the Board.[4] So far as we can determine, the question whether such suits are pre-empted has never before been decided by any court; however, the available authority strongly suggests that the court below was wrong. Its decision is in conflict with the decisions of other state courts, which have uniformly held that such trusts are subject to state law, and that the federal statutes do not pre-empt control

4. See generally ALI, Restatement of Restitution (§ 167) 679; Bogert, Trusts & Trustees (2d Ed 1965) 303-304 (§ 44); Bogert, Trusts & Trustees (2d Ed 1960) 40-41 (§ 473). The substantive Oregon law, which the court below did not question, is found in *Suitter v. Thompson et ux*, (1961) 225 Or 614 at 624-626, 358 P2d 267; *Meyer v. Barde et al*, (1924) 112 Or 197 at 211, 228 Pac 121.

over them, including controversies over their winding up and the disposition of their funds. Indeed, the cases note that Congress affirmatively excluded pre-emption over their affairs in 29 USC § 309(b).

Thacher v. United Construction Workers (etc.), (1962) 10 NY 2d 439, 180 NE 2d 245, 224 NYS 2d 657

People v. Automobile Transportation Welfare Fund, (1962) 17 App Div 2d 448, 235 NYS 2d 702 at 705-707, aff'd (1963) 13 NY 2d 814, 192 NE 2d 222, 242 NYS 2d 345, cert den (1964) 376 US 908

Cox v. Superior Court of San Bernardino County, (1959) 52 Cal 2d 855, 346 P2d 15 at 18-20

Anno: 88 ALR 2d (1963) 493 at 506-507 and cases there cited

Note, 30 Fordham L Rev 537 (1962)

The question most frequently litigated is more limited: Whether federal courts have any jurisdiction at all over controversies involving welfare funds in the absence of any claim of violations of Taft-Hartley restrictions on payments to employee representatives (29 USC § 186(a), (b)). The weight of authority is that they do not, e.g., *Moses v. Ammond*, (DC SD NY 1958) 162 F Supp 866 at 871-874.

c. It is unlikely that any remedy exists in this or sim-

ilar cases if the decision of the court below is accepted. Board orders to remedy unfair labor practices run against parties to the proceedings who have committed them, whether employers or labor organizations, or their agents.[5] The trustees in these cases were not parties to the Board proceeding or the order, and there was no claim before the Board or in the court below that they were agents of the union or participated in its unfair labor practices.[6] Indeed, the wrongful acts were committed in the course of securing the contract, not in its performance. The trustees merely received funds paid to them under illegally-secured agreements.

The lack of any Board remedy, and the lack of conflict between the policy of the Act and the remedy sought in state court support the view that pre-emption does not extend to these claims against the trustees. *Linn v. United Plant Guard Workers*, (1966) 383 US 53 (15 L Ed 2d 582 at 590-591); *United Steelworkers v. American Internat'l Aluminum Corp.*, (CA 5 1964) 334 F2d 147 at 153.

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5. See 29 USC § 158(a), (b); 29 USC § 160 (a), (b) and (c); *National Marine Engineers Beneficial Ass'n v. N.L.R.B.*, (CA 2 1960) 274 F2d 167 at 170-171. Under 29 USC § 152(13), common law principles of agency control the responsibility of either for the acts of third parties, e.g., *N.L.R.B. v. International Longshoremen's & Ware. Union*, (CA 9 1960) 283 F2d 558 at 563.

6. The Board has twice entered orders against trustees and trusts operated under collective bargaining agreements based on its findings in both cases that the trustees were "agents" of the union or the employer (or both) under the trust agreements and that they had themselves committed unfair labor practices in the course of administering the trusts. *Local 80, Sheet Metal Workers*, (10/21/66) 161 NLRB No. 7; *J. J. Hagerty, Inc.*, (10/31/62) 139 NLRB 633, enf'd in part, *Local 138, Internat'l U. of Operating Engineers v. N.L.R.B.*, (CA 2 1963) 321 F2d 130 at 137.

The relationship between the regulation of these trusts under state law and the exclusive jurisdiction of the Board to remedy unfair labor practices should be defined by this Court.

I.

The court below erroneously held that the Board's decision had no effect on the derivative contract rights of the trustees in state court proceedings.

In its decision, the court below refused to give effect to the Board's decision in suits against third party beneficiaries of the agreements whose rights were wholly derivative and dependent upon its validity. It did so on the ground that judgments for petitioners would constitute a remedy for the union's unfair labor practices and would invade the Board's exclusive jurisdiction over them. The effect of the decision is to allow the trustees to retain the money and continue to administer it under the terms of an agreement which the Board has declared to be invalid.

It is established that a collective bargaining agreement procured through unfair labor practices is not partially valid, but falls in its entirety,[7] and following such determination no court can compel further per-

7. *Garment Workers v. NLRB*, (1961) 366 US 731 at 737.

formance of the contract by any party to it.[8] However, the question of the effect on third party rights of a Board decision setting aside a collective bargaining agreement was reserved for future consideration in *National Licorice Co. v. National Lab. Rel. Board*, supra, (1940) 309 US 350 at 365:

> "The effect of the Board's order, as we construe it, is to preclude the petitioner from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. It does not foreclose the employees from taking any action to secure an adjudication upon the contracts nor prejudge their rights in the event of such adjudication. We do not now consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it. * * *"[9]

The decision of the court below that claims against third parties whose rights depend on the validity of the

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8. *National Licorice Co. v. National Lab. Rel. Board*, (1940) 309 US 350 at 365; *Pittsburgh P. Glass Co. v. National Labor Rel. Bd.*, (1941) 313 US 146 at 155; *Carey v. Westinghouse Electric Corp.*, (1964) 375 US 261 at 272; see generally Anno: 153 ALR 60 at 87 (1944).

9. See also *Revere Copper and Brass, Incorporated v. N.L.R.B.*, (CA 7 1963) 324 F2d 132 at 136-137. In *National Labor R. Board v. Indiana & Michigan Elec. Co.*, (CCA 6 1941) 124 F2d 50 at 55, aff'd (1943) 318 US 9 the court concluded that in *National Licorice* and in *National Labor Rel. Bd. v. Pennsylvania G.-Lines*, (1938) 303 US 261

> "* * * the contracts were void ab initio. * * *"

contract are pre-empted by the Act requires that this question should now be answered.[10]

The case is no different from one to recover possession of property held under a lease or other agreement which has been determined to be invalid. In fact, it is stronger. The trustees' right to hold and administer the funds is wholly dependent upon the contract which the Board set aside; they have no beneficial interest in the funds at all. The court below did not deny that Oregon law in any other case would impose a constructive trust on the funds upon the failure of the express trusts. However, it concluded that to do so in this case would invade the Board's jurisdiction over unfair labor practices.

The question is not whether granting relief in these cases would remedy an unfair labor practice; rather, by failing to grant it, and by allowing the trustees to retain and continue to administer the funds, the court below effectively enforced collective bargaining agreements which the Board had set aside in their entirety. In effect, it denied that the Board's decision could be recognized in the case. The question of the effect of the Board's decision on the derivative contract rights of the trustees should be resolved by this Court.

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10. That the interests of the trusts are separate from those of the union was established in *Lewis v. Benedict Coal Co.*, supra, (1960) 361 US 469.

CONCLUSION

The questions presented are important ones, and their resolution by this Court is imperative. In its decision, the court below held that the subject matter of the action was not within its jurisdiction; the result of the decision is to effectuate a contract which the Board has declared to be illegal under federal law and violative of federal policy. Its error and confusion can only cause grave concern among those charged with administering the national labor policy.

The foregoing petition for a writ of certiorari to the Supreme Court of the State of Oregon should be granted.

Respectfully submitted,

JAMES C. DEZENDORF
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December 19, 1966

APPENDIX A

29 USC § 158, July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705(a), 73 Stat. 525, 542, 545.

* * * (b) It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

29 USC § 160, June 7, 1934, c. 426, 48 Stat. 926; July 5, 1935, c. 372, § 10, 49 Stat. 453; June 25, 1936, c. 804, 49 Stat. 1921; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; August 28, 1958, Pub. L. 85-791, § 13, 72 Stat. 945; Sept. 14, 1959, Pub. L. 86-257, Title VII, §§ 704(d), 706, 73 Stat. 544.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor

practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: * * *

29 USC § 186, June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; Sept. 14, 1959, Pub. L. 86-257, Title V, § 505, 73 Stat. 537.

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; * * *

* * * * *

(b) (1) It shall be unlawful for any person to bequest, demand, receive, or accept, or agree to re-

ceive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(c) * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sick ness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by

interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; * * *

29 USC § 309, Pub. L. 85-836, § 16, formerly § 10, Aug. 28, 1958, 72 Stat. 1002, renumbered and amended Pub. L. 87-420, § 16(a), (b), Mar. 20, 1962, 76 Stat. 38, 41.

(b) The provisions of this chapter, except subsection (a) of this section and section 308d of this title, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF OREGON
In Banc

Corvallis Sand & Gravel Co., an Oregon corporation,
Appellant,

v.

Hoisting and Portable Engineers Local Union No. 701; P. R. Wages, Clyde Johnson, and Carl Reams, Individually and as Representatives of a Class to Which They Belong; P. R. Wages, Clyde Johnson, Carl Reams, M. A. Erland, W. Ray Rogers and Leonard Runkle as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Health and Welfare Fund; P. R. Wages, Clyde Johnson, Carl Reams, M. A. Erland, W. Ray Rogers, Leonard Runkle and Wm D. Robertson, as Trustees of the Local 701 Hoisting and Portable Engineers-AGC Pension Fund,
Respondents.

Eugene Sand & Gravel, Inc., an Oregon corporation,
Appellant,

v.

Hoisting and Portable Engineers Local Union No. 701 et al,
Respondents.

Wildish Sand & Gravel Co., an Oregon corporation,
Appellant,

v.

Hoisting and Portable Engineers Local Union No. 701 et al,
Respondents.

HOLMAN, J.

Three identical suits in equity have been combined for the purpose of this appeal. In each instance the defendants are the Hoisting and Portable Engineers Local Union No. 701, the trustees of the union's health and welfare fund, and the trustees of its pension fund. The plaintiffs are three employers who individually entered into collective bargaining agreements with the defendant union. The relief sought is rescission of the agreements, restitution of the sums paid thereunder, and an accounting to determine the amounts so paid. Plaintiffs sought to recover from the union the additional wages paid to its members, and from the health and welfare trustees and pension trustees the sums paid to their respective funds for the benefit of members of the union. Plaintiffs have appealed in each case from the trial court's dismissal of their complaints when they refused to plead further following the sustaining of defendants' demurrers.

Plaintiff's complaints in each instance alleged as follows:

"V.

"* * * defendant, Local 701, engaged in a course of conduct involving threats, duress and coercion against plaintiff. Such conduct consisted of picketing, threats of picketing, strike action and threats of strike action. By such conduct, Local 701 * * * obtained and coerced a separate contract or purported contract from plaintiff * * *.

"VI.

"Said course of conduct of defendant Local 701 * * * was found to be illegal and in violation of federal law by the National Labor Relations Board by its determination which was duly made and which was issued March 13, 1963. The National Labor Relations Board * * * ordered that said separate contract or purported contract was illegal, voided, set aside and of no effect.

"VII.

"As a consequence of said * * * voided contract, and as a direct and proximate consequence of defendant Local 701's conduct * * * as above described, plaintiff has paid to * * *."

The grounds for the demurrers were that the court did not have jurisdiction over the subject matter and that the complaints did not state causes of suit. Defendants claimed the trial court lacked jurisdiction because the subject matter is pre-empted by the Labor Management Relations Act (LMRA) to the exclusive jurisdiction of the National Labor Relations Board (the Board) and that the complaint did not state a cause of suit because it showed plaintiffs sought, obtained and accepted relief from the Board without asking for the relief sought by the present suits.

The principal issue involved in this case is whether Congress has so pre-empted to the Board the field of labor relations as to deprive state courts of authority to grant the relief of rescission here sought. The plaintiffs

charged before the Board, and the Board found, that the union was guilty of unfair labor practices under the Labor Relations Management Act, 61 Stat 141, § 8(b)-(1)(B) and (3) (1947), 29 USC & 158(b)(1)(B) and (3) (1964). The unfair practices were refusing to bargain collectively with a multiemployer group of which plaintiffs were members, and by strikes and threats of strikes coercing plaintiffs into breaking away from such group and contracting with the union independently.

In determining the intent of Congress concerning pre-emption the Supreme Court of the United States used the following language in Garner v. Teamsters Union, 346 US 485, 490-491, 74 S Ct 161, 98 L ed 228 (1953), which was quoted with approval in San Diego Bldg. Trades Council v. Garmon, 359 US 236, 242-243, 79 S Ct 773, 3 L ed2d 775 (1959):

> " 'Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals

and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . .' "

There can be no doubt that the Board had the exclusive authority to determine whether the actions of the union were unfair labor practices under the Act. Plaintiffs do not otherwise contend. Having found that the union was guilty of unfair labor practices, is the fashioning of the remedy for these infractions of labor ethics within the sole province of the Board, or may state courts decree the contract is rescinded from its inception?

In San Diego Bldg. Trades Council v. Garmon, supra, the court said:

"* * * Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. See Garner v. Teamsters Union, 346 US 485, 492-497. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanc-

tion either involves a conflict with federal policy in that it involves allowing two law-making sources to govern. In fact, *since remedies form an ingredient of any integrated scheme of regulation*, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." (359 US 246-247). (Emphasis added.)

Again, in I. A. of M. v. Labor Board, 311 US 72, 82, 61 S Ct 83, 85 L ed 50 (1940), the court without any dissent said as follows:

"* * * Where as a result of unfair labor practices a union cannot be said to represent an uncoerced majority, the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated. That necessarily involves an exercise of discretion on the part of the Board—discretion involving an expert judgment as to ways and means of protecting the freedom of choice guaranteed to the employees by the Act. *It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged.* National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 US 261, 271; National Labor Relations Board v. Falk Corp., 308 US 453, 461. * * *" (Emphasis added.)

The determination of the relief to which a party to a collective bargaining agreement may be entitled, where the agreement was obtained by unfair labor practices, is sufficiently important in the regulatory process as to be within the sole province of the Board.

There would be no logical distinction between regulation by a remedy such as injunction or an action for damages, on the one hand, and a remedy such as the return of benefits received under the contract through rescission on the other.

This is not a situation where the activity regulated was a merely peripheral concern of the LMRA,[1] nor did it relate to the vindication of interests which were deeply rooted in local feeling and responsibility in which there were, therefore, overriding state interests.[2] No one has called to our attention any Oregon regulation or common law requiring a union to bargain collectively with a multiemployer group or preventing a union from striking for the purpose of making an employer bargain separately with it where a labor dispute exists. There is no state right which the court is requested to vindicate.

The plaintiffs urge that the rescission of the agreements and recovery of the additional sums paid thereunder "are contractual consequences of the Board's determination" and that the granting by a state court

1. Linn v. United Plant Guard Workers, 383 US 53, 86 S Ct 657, 15 L ed2d 582 (1966); San Diego Bldg. Trades Council v. Garmon, 359 US 236, 79 S Ct 773, 3 L ed2d 775 (1959); International Asso. Machinists v. Gonzales, 356 US 617, 78 S Ct 923, 2 L ed2d 1018 (1958).

2. Linn v. United Plant Guard Workers, supra note 1; Association of Journeymen v. Borden, 373 US 690, 83 S Ct 1423, 10 L ed2d 638, rehearing den., 375 US 872, 84 S Ct 28, 11 L ed2d 101 (1963); San Diego Bldg. Trades Council v. Garmon, supra note 1; Youngdahl v. Rainfair, 355 US 131, 78 S Ct 206, 2 L ed2d 151 (1957); Automobile Workers v. Russell, 356 US 634, 78 S Ct 932, 2 L ed2d 1030 (1958); Auto Workers v. Wisconsin Board, 351 US 266, 76 S Ct 794, 100 L ed 1162 (1956); United Workers v. Laburnum Corp., 347 US 656, 74 S Ct 833, 98 L ed 1025 (1954).

of the relief sought would not interfere with, but rather aid and be in conformance with the Board's policy. They point out that state courts are always available to vindicate federally-created rights.

If it was the Board's belief that the "expunging" of the union's prior unfair labor practices required the union to make restitution of the additional money paid its members, the Board would have so ordered. Congress delegated the following authority to the Board where unfair labor practices were involved:

> "* * * If * * * the Board shall be of the opinion that any person * * * has engaged in * * * any * * * unfair labor practice, then the Board * * * shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative action* including reinstatement of employees with or without back pay, *as will effectuate the policies of this subchapter* * * *." 61 Stat 147, § 10(c), 29 USC § 160(c) (1947). (Emphasis added.)

The restitution of money paid as a result of a contract entered into because of unfair labor practices would certainly come within "* * * such affirmative action * * * as will effectuate the policies of this subsection * * *." A cease and desist order may be a reparation order operating retrospectively. National Labor Rel. Bd. v. Williamson-Dickie Mfg. Co., 130 F2d 260, 263 (5th Cir 1942). The Board's failure to order restitution

indicates its belief that in this instance federal labor policy did not require it.

Plaintiff makes the contention that the Board had no jurisdiction over the trustees and that therefore there could be no pre-emption of plaintiff's claims against the trustees. Presuming the Board had no jurisdiction over the trustees, there is still no basis for relief against the trustees in court. Restitution from the trustees would be as much regulation of federal labor policy concerning unfair labor practices as would restitution by the union. The trustees are third-party beneficiaries of the contract between plaintiffs and the union. If, in the opinion of the Board, federal labor policy does not require the union, which was a party to the contract, to make restitution, there is no basis for asserting that the trustees should be required to do so by a state court where no state law or policy is offended. As has been previously quoted in this opinion from *Garmon:* "* * * since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant *a remedy* here *which has been withheld from the National Labor Relations Board* only accentuates the danger of conflict." (Emphasis added.)

Plaintiffs contend that their complaints state a cause of suit under 61 Stat 156, 301(a) (1947), 29 USC § 185(a) (1964). The subsection provides:

"(a) Suits *for violation* of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (Emphasis added.)

In Dowd Box Co. v. Courtney, 368 US 502, 82 S Ct 519, 7 L ed2d 483 (1962), the court held that the mention of the federal district court in this statute did not operate to divest a state court of jurisdiction.

The pre-emption doctrine has no application to cases under § 301(a) LMRA even though the violation of the contract is also an unfair labor practice. Smith v. Evening News Assn., 371 US 195, 197, 83 S Ct 267, 9 L ed2d 246 (1962); Teamsters Local v. Lucas Flour Co., 369 US 95, 101 n. 9, 82 S Ct 571, 7 L ed2d 593 (1962); Lodge #12, International Asso. of Machinists v. Cameron Iron Works, 257 F 2d 467 (5th Cir), cert. den. 358 US 880, 79 S Ct 120, 3 L ed2d 110 (1958).

It has been held that suits for reformation of a contract,[3] for specific performance,[4] for declaratory relief determining the contract to be valid and for damages

3. International Asso. of Machinists v. United Aircraft Corp., 190 F Supp 464 (DC Conn 1961).

4. Independent Petroleum Workers of N. J. v. Esso Stand. Oil Co., 235 F 2d 401 (3d Cir 1956).

for its breach,[5] for a declaratory judgment that a provision of the contract is unenforceable because compliance would be an unfair labor practice,[6] and to enjoin violation,[7] are all within the term "suits for violation of contracts" as contemplated by the statute.[8]

The present suits are to rescind the contracts involved, not for their violation. No substantive contract right is being asserted which the court is asked to remedy. The relief requested is directed to the rescission of the contract because of unfair labor practices rather than the enforcement of any rights thereunder. No case has come to our attention where a suit to rescind such a contract was held to be within the statute's purview.[9] To apply § 301(a) LMRA to suits to rescind labor contracts because of unfair labor practices in their procure-

5. Dowd Box Co. v. Courtney, supra.

6. Todd Shipyard Corp. v. Industrial Union of Marine, etc., 344 F2d 107 (2d Cir 1965).

7. Humphrey v. Moore, 375 US 335, 84 S Ct 363, 11 L ed2d 370 (1964).

8. This opinion has treated the suit against the *union* as one for rescission and restitution. It was unnecessary to decide whether it might in fact be a tort action for damages occasioned to the employers because of coercive practices which resulted in the employers paying money to the union's individual members. No money was paid to the union as such but only to individual employees. If in fact it is a tort action, § 301 (a) would have no application. Rock Drilling, Blasting, etc. v. Mason & Hanger Co., 217 F2d 687 (2nd Cir 1954); Burlesque Artists Assn. v. I. Hirst Enterprises, 134 F Supp 203 (DC Pa 1955). If it is in fact a damage action against the union because of unfair labor practices, pre-emption would also prevent its prosecution. San Diego Bldg. Trades Council v. Garmon, supra.

9. A case, which might be construed as indicating a suit for rescission under § 301(a) is not proper, is Adams v. Budd Co., 349 F2d 368 (1965). There the court indicated that actions of parties in entering into a labor contract which violated existing rights were not violations of contract as contemplated by & [sic] 301 (a). The court said as follows:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert were independently, and pre-agreement, vested in them by their 'contract of hire.'"

ment would open to regulation by courts almost the entire field of unfair labor practices. We do not believe this was the intention of Congress. The words of the statute have been given a broad construction, but if any significance is to be given to the words "for violation of contracts" a suit such as the present one does not come within its embrace.

The judgment of the trial court is affirmed.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 3rd day of OCTOBER 1966, WHEREUPON on this WEDNESDAY, the 12th day of OCTOBER 1966, the same being the 7th judicial day of said term, when the following proceedings were had:

CORVALLIS SAND & GRAVEL CO., an Oregon corporation,
Appellant

v.

HOISTING AND PORTABLE ENGINEERS LOCAL UNION No. 701; * * *,
Respondents

This cause on June 6, 1966, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of dismissal of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

* * * * *

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 3rd day of OCTOBER 1966, WHEREUPON on this WEDNESDAY, the 12th day of OCTOBER 1966, the same being the 7th judicial day of said term, when the following proceedings were had:

EUGENE SAND & GRAVEL, INC., an Oregon corporation,
Appellant

v.

HOISTING AND PORTABLE ENGINEERS LOCAL UNION No. 701; * * *,
Respondents

This cause on June 6, 1966, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of dismissal of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

* * * * *

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 3rd day of OCTOBER 1966, WHEREUPON on this WEDNESDAY, the 12th day of OCTOBER 1966, the same being the 7th judicial day of said term, when the following proceedings were had:

WILDISH SAND & GRAVEL CO., an Oregon corporation,
Appellant

v.

HOISTING AND PORTABLE ENGINEERS LOCAL UNION No. 701; * * *,
Respondents

This cause on June 6, 1966, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the decree of dismissal of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

* * * * *

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.